STATE OF MICHIGAN

COURT OF APPEALS

SACHSE CONSTRUCTION AND DEVELOPMENT CORPORATION, Plaintiff/Counterdefendant-Appellant,	UNPUBLISHED March 16, 2004
v	No. 243681 Genesee Circuit Court
EVERLAST TRUST, Defendant/Counterplaintiff-Appellee.	LC No. 2001-069939-CK

Before: Jansen, P.J. and Markey and Gage, JJ.

PER CURIAM.

In this breach of contract action involving a construction contractor and its subcontractor, plaintiff contractor Sachse Construction and Development Corporation appeals as of right from a judgment awarding defendant Everlast Trust $12,269.50, plus $7,585.53 in attorney fees and costs, on its counterclaim. The judgment was premised on a jury's finding that defendant did not breach the parties' agreement requiring defendant to install an exterior finish insulation system (EFIS) on a newly constructed Flint Walgreens pharmacy, and that plaintiff did breach the agreement. We affirm.

I

Plaintiff first argues that the circuit court erred in denying its motion for judgment notwithstanding the verdict (JNOV) or a new trial. We disagree.

A

A circuit court's decision on a motion for JNOV is reviewed de novo. *Sniecinski v BCBSM*, 469 Mich 124, 131; 666 NW2d 186 (2003). In reviewing the decision, this Court must view the evidence and all legitimate inferences from it in the light most favorable to the nonmoving party. *Id.* If reasonable jurors could have honestly reached different conclusions, the jury verdict must stand. *Central Cartage Co v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998). Only if the evidence failed to establish a claim as a matter of law was JNOV appropriate. *Sniecinski*, *supra*.

Whether to grant a new trial is in the trial court's discretion, and this Court will not reverse a trial court's decision absent a clear abuse of that discretion. *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001); *Setterington v Pontiac General Hosp*, 223 Mich App 594, 608; 568 NW2d 93 (1997). An abuse of discretion occurs when the decision was so violative of fact and logic that it evidenced a perversity of will, a defiance of judgment, or an exercise of passion or bias, *Bean v Directions Unlimited, Inc*, 462 Mich 24, 34-35; 609 NW2d 567 (2000), or the trial court misapplied or misunderstood the law, *Bynum v ESAB Group, Inc*, 467 Mich 280, 283; 651 NW2d 383 (2002).

MCR 2.611(A) provides, in relevant part, that a new trial may be granted on all or some of the issues when the substantial rights of a party were materially affected and there was:

> (e) A verdict or decision against the great weight of the evidence or contrary to law.
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> * * *
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> (g) Error of law occurring in the proceedings, or mistake of fact by the court.

When a party challenges a jury's verdict as against the great weight of the evidence, this Court may overturn the verdict only if it appears manifestly against the clear weight of the entire record, and should not set aside a verdict if there is competent evidence to support it. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999). The trial court cannot substitute its judgment for that of the factfinder. *Ellsworth, supra* at 194. The issue usually involves matters of credibility or circumstantial evidence, *In re Robinson*, 180 Mich App 454, 463; 447 NW2d 765 (1989), and if there is conflicting evidence the question of credibility ordinarily should be left for the factfinder, *Rossien v Berry*, 305 Mich 693, 701; 9 NW2d 895 (1943); *Whitson v Whiteley Poultry Co*, 11 Mich App 598, 601; 162 NW2d 102 (1968).

B

The parties do not dispute that (1) they entered into their written subcontractor agreement on December 10, 2000,[1] or (2) by the time the December 2000 subcontractor agreement was executed, defendant had at least nearly completed the EFIS installation, which it began in late September 2000. The precise breach of contract that the jury found plaintiff committed is not evident from the jury's general verdict. The jury presumably may have adopted one of the

[1] Although the parties repeatedly refer to the subcontractor agreement as dated December 7, 2000, the day that defendant's representative signed it, plaintiff's representative did not sign the agreement until December 10, 2000.

following theories set forth within defense counsel's closing argument: (1) that plaintiff prevented defendant's proper performance by prematurely requiring defendant to commence work when no proper curb or interior floor existed to permit the proper measuring of a starting point; (2) that plaintiff, through its project superintendent, Charles McFarlin, approved defendant's starting location; (3) that McFarlin directed defendant's employees to "kill" some misaligned V-grooves in a corner of the building; (4) that plaintiff's employees subsequently failed to advise defendant of the unacceptability of its work until defendant had completed it and prepared to leave the job site; (5) that plaintiff's employees dictated the manner of the repairs attempted by defendant; and (6) that plaintiff's owner thereafter rejected defendant's proposal to remedy the poor repairs, and neglected to pay defendant a balance due of more than $12,000.

C

After reviewing the trial record, we conclude that the evidence substantiates multiple different logical scenarios pursuant to which the jury reasonably could have found in favor of defendant. First, the jury reasonably could have found from the evidence that before the execution of the December 10, 2000, subcontractor agreement, the parties contracted for defendant's EFIS installation and that defendant completed the installation according to various oral modifications on which the parties agreed.[2] Testimony at trial reflected that in late September 2000, defendant began work on the project pursuant to the parties' negotiation that it would install the EFIS in return for payment of $43,700 and the preparation by plaintiff's owner, Todd Sachse, of a purchase order for defendant's EFIS installation; that defendant proceeded with the EFIS installation and incorporated modifications on which David Chomsky, plaintiff's manager of the construction project, McFarlin, and defendant's employees agreed; and that defendant completed installation to McFarlin's satisfaction in late November or early December 2000.[3] See *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 548-549; 487 NW2d 499 (1992) (explaining that a valid contract requires an objective showing of mutual assent concerning all material terms). The record also contains a collection of "Daily Construction Report[s]" that documented the progress of the Walgreens construction. The EFIS entry dated December 8, 2000, reads, "Drop scaffolding & review repairs." The jury could rationally have found from this entry and other testimony suggesting that defendant completed the installation sometime by the beginning of December 2000, that defendant substantially performed the terms of an installation agreement with plaintiff before December 10, 2000, when plaintiff signed the written subcontractor agreement.

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[2] The parties introduced the December 10, 2000, subcontractor agreement into evidence and appeared to refer to the agreement during their closing arguments, but the circuit court's instructions to the jury did not specify that the jury should restrict its consideration to the December 10, 2000 agreement. The court generally advised that plaintiff and defendant "have previously agreed that a valid and binding contract existed between them regarding [defendant's] installation of EFIS. Accordingly, you are to determine, one, if [defendant] breached the contract, and, two, whether [plaintiff] was damaged by the breach of contract."

[3] Plaintiff does not suggest on appeal that either Chomsky or McFarlin lacked the capacity to speak for plaintiff in a representative capacity.

D

Second, even assuming that the jury's verdict depended on the December 10, 2000, subcontractor agreement, sufficient evidence still supports the jury's verdict for defendant. Matthew Harag, supervisor of defendant's operations, and brothers Christopher and Chad Simmonds, defendant's foreman and a construction worker on the Walgreens' project, respectively, testified that defendant completed its EFIS installation to McFarlin's satisfaction, with V-grooves straight and level, by late November or early December 2000. The testimony of Harag and Chris Simmonds also indicated that Chomsky and McFarlin altered the parties' subcontractor agreement by ordering that defendant engage in repair work that required making the ends of the existing V-grooves meet, despite that this correction would render the grooves not level. Some witness testimony and the project log entered into evidence suggested that defendant's repairs did not begin until the second week of December 2000, specifically December 11, 2000, the day after plaintiff signed the subcontractor agreement.[4]

On the basis of this evidence, the jury rationally could have found: (1) either that (a) after execution of the December 2000, subcontractor agreement, plaintiff knowingly and voluntarily relinquished the subcontractor agreement term mandating strict adherence to the project plans and specifications, *Bissell v L W Edison Co*, 9 Mich App 276, 287; 156 NW2d 623 (1967)[5]; or (b) the parties subsequently and by mutual assent modified the written contract to account for plaintiff's desired repair, *Kamalnath*, *supra* at 548-549; and (2) despite defendant's reservations regarding the manner of the repair, it satisfied its obligation to complete the repair requested.

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[4] As a basis for discounting the testimony of several of defendant's employees that Chomsky and McFarlin orally directed them to deviate from the plans and specifications, plaintiff heavily relies on the subcontractor agreement's provision forbidding alteration of its terms absent a writing. But plaintiff ignores that parties to a contract generally remain empowered to modify the terms of an agreement between them by their mutual consent. Michigan courts long have recognized the proposition that parties may verbally modify a written contract, despite that the written contract expressly prohibits alterations other than in writing. *Reid v Bradstreet Co*, 256 Mich 282, 286; 239 NW 509 (1931) (characterizing as well-established the proposition that a written contract may be varied by a subsequent parol agreement unless forbidden by the statute of frauds, even though the parties to the original contract stipulate therein that it must not be changed except by written agreement); *Zurich Ins Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 601; 576 NW2d 392 (1997) (noting with respect to a contract clause specifying that it can only be amended by a further written contract that such language, although frequently seen, is wholly nugatory). Consequently, the subcontractor agreement clause purporting to permit only written modification of the agreement's terms did not preclude a finding by the jury that plaintiff and defendant validly altered the agreement's terms. *Fenner v Bolema Construction Co*, 330 Mich 400, 402; 47 NW2d 662 (1951) (observing that "[t]here having been a dispute as to the terms of the original agreement and as to whether a substituted agreement had been made, the questions in that regard were properly for the jury").

[5] Had the parties' written subcontractor agreement existed since the inception of defendant's work on the project, several witnesses' testimony regarding McFarlin's directives to kill the grooves in a corner also would have constituted a basis for the jury's reasonable finding that plaintiff waived the plans and specifications. *Bissell*, *supra* at 287.

The jury further could have found on the basis of the evidence that, despite defendant's satisfaction of its obligation, plaintiff refused to pay the remaining amount in excess of $12,000 that it owed defendant pursuant to the subcontractor agreement.[6]

E

In light of our conclusions that the jury reasonably could have found for defendant irrespective of the existence of the December 2000 subcontractor agreement, we need not consider plaintiff's further assertion that the parol evidence rule precluded the jury's consideration of any purported oral modifications of the EFIS project plans and specifications that occurred before the parties' entry into the December 2000 subcontractor agreement. We, nonetheless, briefly note that, given the subcontractor agreement's specific contemplation that plaintiff could require changes or deviations to the plans and specifications, the evidence of McFarlin's instructions with respect to defendant's EFIS installation did not *vary* the terms of the agreement. The evidence of McFarlin's precise directives to defendant, for example his instruction that defendant's employees should "kill" certain grooves in a corner, lends substance to the otherwise vague and uncertain phrase "all changes or deviations" from project plans and specifications ordered by plaintiff. Under this logic, the jury properly considered the evidence of the changes authorized by McFarlin in ascertaining the parties' intended meaning of the

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[6] Despite defendant's arguments to the contrary, the evidence introduced at trial did not support a determination by the jury that defendant's proper performance of its contractual obligation was rendered impossible by plaintiff or other subcontractors. Defendant suggested that impossibility of performance existed because it could not measure the job starting point given the lack of a concrete floor or concrete curbs when it began the EFIS installation. Even assuming that the building preparation qualified as inadequate when defendant commenced its EFIS installation and that Eric Philstrom, one of defendant's construction workers on the project, and Chad Simmonds could not properly measure the starting point, Chris Simmonds opined that defendant probably could have measured an appropriate starting point, and no testimony affirmatively asserted that the difficulty in ascertaining a starting point caused defendant's allegedly defective installation of uneven V-grooves, or grooves that did not intersect at corners. Similarly, while Chris Simmonds opined that he encountered shoddy work by other subcontractors, including uneven masonry blocks, the poor framing of one wall that necessitated defendant's utilization of a piece of custom foam, and a deviation from the plans on the building's drive-thru canopy, (1) Simmonds did not explain how these other subcontractors' defects prevented defendant from installing level grooves that intersected at the building's corners, (2) Harag denied that the wall framing irregularity affected the level of the V-grooves installed by defendant, and (3) Harag further expressly declined to assert that any other poor subcontractor work caused the alleged deviations in defendant's EFIS installation. Under these circumstances, we conclude that the jury could not reasonably have found that either actions of plaintiff or the poor work of other subcontractors rendered objectively impossible defendant's EFIS installation according to the project plans and specifications. *Kiff Contractors, Inc v Beeman*, 10 Mich App 207, 210; 159 NW2d 144 (1968); *Bissell*, *supra* at 283-287.

subcontractor agreement. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463, 470; 663 NW2d 447 (2003).

F

In summary, although the precise trail of logic the jury followed in finding for defendant cannot be ascertained, we must uphold the jury's verdict unless it can be said that no material factual question exists on which reasonable minds might differ. *Sniecinski, supra* at 131; *Central Cartage Co, supra* at 524. In this case, the record supported two widely divergent accounts that alternatively attributed the end results of defendant's EFIS installation to the directions of McFarlin and Chomsky, or on defendant's poor workmanship. The jury apparently credited the testimony of defendant's employees that they sought to comply in all respects with plaintiff's directives. We will not interfere with the weighing of evidence or credibility determination by the jury where, as here, it honestly could have reached different conclusions. See *Central Cartage Co, supra* at 524. Consequently, upon a de novo review, we conclude that the circuit court properly denied plaintiff's motion for JNOV.

We further conclude that the circuit court properly denied plaintiff's motion for a new trial because the jury's verdict does not appear manifestly against the clear weight of the evidence presented at trial. *Ellsworth, supra* at 194. To the contrary, the parties presented directly conflicting evidence regarding defendant's substantial performance of its contractual obligations, and the jury simply had to decide which of the conflicting evidence to believe. Because competent evidence supports the jury's verdict, we must give "deference to the trial court's unique ability to judge the weight and credibility of the testimony and should not substitute [our] judgment for that of the jury." *Id*. The trial court did not abuse its discretion in denying plaintiff's motion for a new trial. See *Kelly, supra* at 34; *Setterington, supra* at 608.

II

Plaintiff next raises two unpreserved arguments regarding whether consideration existed to support defendant's promise of performance within the December 2000 subcontractor agreement and the purported oral modifications to the December 2000 agreement. *Shuler v Michigan Physicians Mut Liability Co*, ___ Mich App ___; ___ NW2d ___ (Docket No. 239291, issued 2/10/04), slip op at 17. We decline to consider these questions, one which was not raised before the circuit court and the other that the circuit court did not squarely address. In addition, the fact that consideration might not have existed to support defendant's obligation under the December 2000 subcontractor agreement or an oral modification of the December 2000 subcontractor agreement does not render infirm the jury's verdict for defendant on the basis of the following scenarios, which were amply supported by the evidence introduced at trial: (1) the jury reasonably could have found that defendant substantially completed the EFIS installation pursuant to oral agreements of the parties; (2) the jury reasonably could have found that defendant substantially performed the terms of the written subcontractor agreement; (3) the jury reasonably could have found that the parties modified the written contract pursuant to plaintiff's ordered repairs, or that plaintiff waived the project specifications by ordering the unwise repairs, and that defendant made the repairs as requested; and (4) the jury properly considered prior oral agreements of the parties that clarified the December 2000 subcontractor agreement's provision concerning changes and deviations authorized by plaintiff, and on the basis of this evidence reasonably could have determined that plaintiff had authorized the EFIS deviations of which it

complained. *Zdrojewski v Murphy*, 254 Mich App 50, 70; 657 NW2d 721 (2002) (explaining that this Court will not reverse a decision of a trial court when the correct result is reached for the wrong reason).

Affirmed.

/s/ Kathleen Jansen
/s/ Jane E. Markey
/s/ Hilda R. Gage